RE ONG THIM KUANG, EX P PUBLIC BANK BHD AND OTHER APPEALS

HIGH COURT MALAYA, KOTA BHARU
SURIYADI HALIM OMAR J
[BANKRUPTCY NO: 29-148-1993]
1 FEBRUARY 2000

BANKRUPTCY: *Petition - Service - Substituted service - Whether petition served must be sealed - Whether unsealed photostatted copy sufficient - Interpretation of order of court - Whether judgment debtor misled or prejudiced - Bankruptcy Rules 1969, rr. 109, 110*

BANKRUPTCY: *Petition - Service - Affidavit of service - Whether sealed copy of petition must be annexed thereto - Whether unsealed photostatted copy sufficient - Whether substantial injustice caused to judgment debtor - Bankruptcy Rules 1969, rr. 111(2), 112*

This was the judgment debtor's appeal against the decision of the deputy registrar dismissing his notice of opposition. The grounds of appeal were, *inter alia*, that: (i) the creditor's petition served on him by way of substituted service was unsealed thereby contravening r. 109 Bankruptcy Rules 1969 ('the BR'); and (ii) the affidavit of service had a photostatted copy of the petition annexed to it instead of a sealed copy thereby contravening r. 111(2) of the BR.

Held:

[1] Rule 110 of the BR which governs substituted service is silent as regards the form of a creditor's petition served thereunder; it does not indicate that such a petition must be sealed. Hence, much depends on the order pronounced by the court. In the instant case, the order concerned was silent on the format of the petition with no indication as to whether it had to be a sealed or unsealed copy. Consequently, the judgment creditor was at liberty to exhibit the petition in the format he thought fit, so long as it did not mislead or prejudice the judgment debtor. Moreover, the contents of the unsealed copy of the petition were correct and sufficiently clear. Thus, it was not even necessary to resort to s. 131 of the Bankruptcy Act 1967 as there was no irregularity or formal defect.

[2] Although the creditor's petition that was annexed to the affidavit of service was an unsealed photostatted copy, no substantial injustice was caused to the judgment debtor.

[Appeals dismissed.]

Case(s) referred to:
Au-Yong v. Dicum & Anor [1963] 29 MLJ 349 ***(refd)***
Kamaruddin Mohamed v. United Motor Works (M) Sdn Bhd [1982] 1 MLJ 126 ***(refd)***
Lim Gait Tong v. Kung Hean Chow [1970] 2 MLJ 173 ***(refd)***
Re Hj Yahya Lampang [1987] 2 MLJ 488 ***(refd)***
Re Samuel Pakianathan Jabamanickam, ex p Perwira Habib Bank (M) Bhd [1997] 5 MLJ 737 ***(foll)***
Re V David, ex p United Asian Bank Bhd [1991] 2 CLJ 1047 ***(refd)***
Rengasamy Pillai v. Comptroller Of Income Tax [1970] 1 MLJ 233 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 131
Bankruptcy Rules 1969, rr. 99(2), (3), 101(1), 109, 110, 111(2), 112
Evidence Act 1950, s. 2

For the judgment debtor - Asmah Azhari; M/s C Jegathesan
For the judgment creditor - Nik Haizam Nik Jaffar; M/s Rithauddeen & Aziz

Reported by Alex KC Lee

JUDGMENT

Suriyadi Halim Omar J:

On 8 June 1990 the Deputy Registrar ordered three Notis Bantahan of the judgment debtor against three bankruptcy petitions be dismissed with costs. On that date, as the above three matters suffered similar afflictions, the court decided to focus on one case, with the decision binding on the rest. Being dissatisfied with the decision, the applicant filed the notice of appeal as per encl. 20. As the matter before me was a rehearing, I decided to follow the same technique and concentrated only on one case, which mercifully was agreed upon by all parties. The three main grounds of objection posed by the applicant were that:

(i) the creditor's petitions served on the appellant by way of substituted service were not sealed copies thus contravening r. 109 of the Bankruptcy Rules 1969;

(ii) the affidavit of service did not annex a sealed copy of the petition but had instead annexed a photostated version and hence contravening r. 111(2) of the Bankruptcy Rules; and

(iii) the affidavit signed on behalf of the creditor, in particular by one Yee Kin Lan, was not an authorised person.

To appreciate the premises of the above objections, it is pertinent to understand not only the initial stages of the processes but the long process of a bankruptcy proceeding. This process will invariably begin with the creditor having successfully obtained a final judgment or some final order from a competent court beforehand. Once that judgment or order continues to remain unsatisfied, and the debtor having committed an act of bankruptcy, which in effect is a statutory test of insolvency, the proper bankruptcy proceedings may thereupon be launched by the creditor. It is quite safe to say that more often then not a petitioner will serve a bankruptcy notice on the debtor. In the wake of its non-compliance a petition ensues, and if successfully proved a receiving order may be granted. Retracing our steps to that bankruptcy notice, it must, *inter alia*, be in a prescribed form, with the judgment sum stated and the period indicated for the satisfaction of the debt, the consequences of non-compliance, etc. The court if satisfied, will mete down the receiving order, and later if pursued by the creditor, an adjudication order be given. Once an adjudication order is pronounced the debtor is effectively a bankrupt.

The repercussion of being declared a bankrupt is exceedingly distressing, to say the least, in that not only is the debtor much maligned in the eyes of his peers, but unable to hold certain positions in companies, prevented from obtaining credit from financial institutions and a host of other restrictions. With such a prohibitive sanction, it is little wonder that Parliament has seen it fit to promulgate the Bankruptcy Act 1967 (Act 360) together with the consequential Rules. In as much as there are protections accorded to the debtor, the creditor's position is not compromised or suffocated to the extent of effectively unseating him from his final judgment. Section 131 of the Bankruptcy Act in crystal clear terms lay down that:

> No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of the opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by an order of the court.

Courts in the past have not been shy in resorting to the above provision whenever technical issues have popped-up, especially when the prescribed rules have not been meticulously adhered to. In the current case, the debtor has strenuously alleged that the creditor has contravened two important rules, apart from having the supporting affidavit affirmed by one Yee Lin Lan who is not an authorised person. I am dismissing outright the objection pertaining to the latter matter as there is no merit to it. I now return to the more pressing matter of rr. 109 and 111(2) of the Bankruptcy Rules

1969, which were supposed to have been contravened. The debtor complained that the petitions served on him, and that annexed in the proof of service affidavit were unsealed. So, are they seriously flawed enough for the court to entertain the Notis Bantahan as per encl. 15, and allow the appeal? It would appear, and admitted by the creditor, that the impugned petitions served on the debtor by way of substituted service were photostated copies.

To appreciate my decision, it is perhaps appropriate if I were to touch on r. 99(2) of the Bankruptcy Rules 1969 first and thereafter followed by the other provisions. The said r. 99(2) provides that the creditor or debtor (depending on the petition) shall lodge with the registrar sufficient number of copies of the petition. They are to be sealed and issued, and interestingly, for service. No specific number is mentioned. Reading the rules further, it would appear that, barring legal complications, the creditor will require no less than four sealed copies, one for the Official Assignee (r. 99(3)), a copy left for the court (r. 101(1)), one for personal service (r. 109), and a copy as an annexed exhibit in the proof of service affidavit (r. 111(2)). But still, that does not explain, for purposes of this case why these sealed copies were not utilised in compliance with the rules, especially when it is relatively easy to obtain additional copies from the court. The creditor's counsel informed me that it was the practice before, in the Kota Bharu High Court, to extract only two sealed copies. Therefore, as admitted in this case, as one was retained by the court, the petitioner had one less sealed copy; and hence perhaps the reason why photostated copies were resorted to. If courts can set guidelines as to the exact number of sealed copies to be filed, problems of this nature may be reduced. As it were, I certainly could not default the petitioner completely as the rules are intertwined, voluminous, and certainly not that easy to follow.

As I intend to resolve the issue of the copies used in the substituted service first, I now take the further step of drawing attention to specific rules, particularly rr. 109 and 110. Pursuant to the former rule, the law promulgates that the petition shall personally be served by delivering a sealed copy of the petition on the debtor. In the event prompt personal service cannot be effected, the court may order substituted service, to be effected in such manner as it thinks fit. This is found in r. 110. Scrutinising this latter provision, it is interesting to note that it is silent as to the delivery of a sealed copy, or for that matter, the character, form or quality of the petition. Much will depend on the order pronounced by the court. That being so, it is thus quite appropriate if the relevant court order, ie, the one pronounced on 25 January 1994, be perused. Again the order is silent as to the format of the petition. It merely orders that a copy of the

creditor's petition each be exhibited at the relevant addresses; again silent as to whether they ought to be sealed or not. As a rider, I ought to remark that such an order not only was pragmatic but also logical. An impossible situation would have arisen if the court had ordered the petition be advertised in some vernacular newspaper, and a sealed copy be exhibited. That being the situation, I am satisfied that the creditor was at liberty to exhibit the petitions in a format he thought fit, conditional on the debtor not being prejudiced by them. The photostated copies clearly had laid down the case number, the creditor and debtor's names, the amount owed by the latter up to 28 January 1993, that the debtor had already committed an act of bankruptcy by 15 May 1993 when the bankruptcy notice personally served on him on 28 February 1999 had remained unsatisfied, with the contents and format of the petition being impeccably correct. What could not be denied by the debtor is that the bankruptcy notice served on him was a sealed one. This petition also clearly indicated the hearing date to be 12 January 1994, with the hearing to be held at the High Court Malaya, Kota Bharu. Based on all these reasons, the debtor cannot be heard to complain that he had been misled or prejudiced in any way (*Re Haji Yahya Lampang* [1987] 2 MLJ 488). To reiterate, not only does r. 110 not indicate that the served copy must be sealed, but the exhibited copies in this case were also sufficiently clear.

Based on the above reasons, there is thus absolutely no necessity for me to seek recourse to s. 131 of the Bankruptcy Act to validate the action. No questions of there being any formal defect or irregularity exist with regard to this first legal objection. Whether the petitions are inadmissible, as they are photostated copies, I feel disposed to reject such an assertion as s. 2 of the Evidence Act 1950 states that the latter Act is inapplicable for affidavit-based hearings.

I now zero in on the issue of the unsealed copy, or to be exact the photostated copy attached to the affidavit of service. This legal poser was raised by the debtor as r. 112 provides that a sealed copy of the petition shall be annexed as an exhibit to that latter affidavit. Reading that provision in isolation, the debtor may be justified in asserting that the creditor had infringed the legislative requirement, and hence entitled to see the bankruptcy proceedings defeated. Inspite of that defect and or irregularity I believe the proceedings are still valid. I do believe that no substantial injustice had been caused by them (s. 131 of the Bankruptcy Act; *Rengasamy Pillai v. Comptroller Of Income Tax* [1970] 1 MLJ 233; *Re v. David ex p United Asian Bank Bhd* [1991] 2 CLJ 1047; [1991] 2 MLJ 127; *Au-Yong v. Dicum & Anor* [1963] 29 MLJ 349). In the case of *Lim Gait Tong v. Kung Hean Chow* [1970] 2 MLJ 173, at p. 174 Azmi LP had occasion to say:

a It cannot reasonably be said that the failure to file a copy of the advertisement has effected the service of the bankruptcy notice and the creditor's petition on the debtor.

One must bear in mind that once the creditor's petition has been served by way of substituted service, it is deemed to have been served. Following b that same argument of Azmi LP, and by analogy, it cannot be said that the creditor's petition annexed to the proof of service affidavit, albeit a photostated copy, could have "effected the service", or caused any substantial injustice to the debtor. I also find solace in the case of *Re Samuel Pakianathan a/l Jabamanickam, ex p Perwira Habib Bank (M) Bhd* c [1997] 5 MLJ 737 where Kamalanathan Ratnam JC (as His Lordship then was) held that eventhough only a true copy of the creditor's petition, and not a sealed copy was annexed to the affidavit of service, that was sufficient. On that score too, the impugned copy in this case is sufficient. Finally, the other reasoning advocated earlier to buttress my views d pertaining to the usage of the photostated copies for the substituted service, is equally valid and applicable here (*Kamaruddin bin Mohamed v. United Motor Works (M) Sdn Bhd* [1982] 1 MLJ 126).

Based on the above reasons I dismiss the appeal with costs. On the basis of the earlier agreement by the contending parties, I also dismiss the other e two appeals with costs.

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